

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1322

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

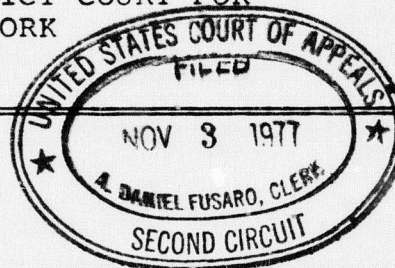
MICHAEL SILBERBERG and
MORDECAI SILBERBERG,

Appellants.

*B
P/S*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS
MICHAEL SILBERBERG and
MORDECAI SILBERBERG



ALBERT J. BRACKLEY, ESQ.
Attorney for Appellant
Michael Silberberg
186 Jerolemon Street
Brooklyn, New York 11201

HOWARD L. JACOBS, ESQ.
DONALD E. NAWI, ESQ.,

Of Counsel

HOWARD L. JACOBS, P.C.
Attorney for Appellant
Mordecai Silberberg
401 Broadway
New York, New York 10013

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UNITED STATES OF AMERICA,

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-against-

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-----x

BRIEF FOR APPELLANTS
MICHAEL SILBERBERG and
MORDECAI SILBERBERG

Michael and Mordecai Silberberg appeal from their convictions of July 29, 1977 in the United States District Court for the Southern District of New York (Metzner, J.) upon a jury verdict of conspiring to transport false checks in interstate commerce, 18 U.S.C. 371, 2314, to wit, \$1.75 million in counterfeit Banker's Trust checks, and a second count of the actual unlawful transportation from New York to Washington, D.C. Judge Metzner sentenced both to fifteen months on the conspiracy count and five years probation on the substantive count, directing, however, that Michael's prison term not commence until he completes an outstanding Eastern District sentence.

Although jointly indicted, defendants were tried separately. At each trial the Government's main proof consisted of the defendant's confession to FBI agents that he had participated in the crime. Without those confessions there could have been no convictions. Their validity is the principal issue on this appeal.

ISSUES PRESENTED FOR REVIEW

The appeal presents four major issues. These are:

1. Whether the district court erred in refusing to suppress the confession on which Michael's conviction rested? That confession was induced by the FBI's promise not to prosecute Michael if he confessed and cooperated.
2. Whether the district court erred in refusing to suppress the confession on which Mordecai's conviction rested? That confession was induced by the FBI's refusal to grant Mordecai protection from threats on his life engendered by Michael's cooperation with the FBI, unless Mordecai agreed as well to confess and cooperate.
3. Whether the district court erred in refusing to dismiss the conspiracy charge, the Government having failed to prove that Michael and Mordecai knew that the counterfeit bonds would be transported interstate?
4. Whether the district court was correct in charging the jury that it could find the interstate transportation element of the substantive count satisfied if Michael and Mordecai sold the counterfeit checks to another without

limitation as to where the sale was to have been made and the other person took it across state lines?

Several subsidiary issues within the framework of these major issues will be dealt with in the Argument.

STATEMENT OF THE CASE

In late August, 1975, in Washington, D.C., FBI agent Yablonsky was put in touch with one Steven Korsen from New York, who was offering to sell \$1.75 million in counterfeit Banker's Trust checks for half the face value. Yablonsky was posing as a Miami businessman interested in the purchase. Ultimately Yablonsky went to New York to inspect the checks, completed arrangements to pay \$510,000 for a little less than the full \$1.75 million, and turned the cash over to Korsen in Washington in return for the checks. Korsen was immediately arrested.

The route from Korsen to the Silberbergs came from their confessions to FBI agents in New York in the days and weeks following Korsen's arrest. Our factual statement gives the outlines of the circumstances which led to the confessions. We cover further details in the Argument portion of the Brief.

Michael

In March 1975 Michael was convicted of mail fraud in the Eastern District and sentenced to one year in prison. While still out on bail pending appeal, and in hopes of reducing his sentence, he furnished valuable information to the FBI as a confidential informant and was paid for this information. He personally was not involved in the crimes about which he informed (Mi. 13-16)*.

* "Mi." refers to the minutes of Michael's trial, "Mor." to Mordecai's trial, and "H" to the hearing on suppression which involved both defendants. "A" denotes the Appendix to this Brief.

Michael's primary contact at the FBI was Special Agent Moody. On or about September 1*Moody learned that Michael had been in Montreal over the Labor Day Weekend in violation of his Eastern District bail limits, trying to sell several Banker's Trust counterfeit checks to another informant who was keeping the FBI abreast of every step Michael took (Mi. 20). Moody, accompanied by two other agents, arranged a meeting with Michael the next day at a pizza parlor across the street from FBI headquarters (A 53). At that time they did not know that Korsen had already been arrested attempting to sell the bulk of the counterfeit checks in Washington to Agent Yablonsky.

The agents first asked Michael where he had been over the weekend. His reply: in Spring Valley, New York with his family (A 53-54). Moody then gave him the Miranda warnings. Nelson, Moody's superior, told Michael that he was lying, that they knew he had been in Canada over the weekend selling counterfeit checks, and that unless he assisted the FBI, "we would go to the United States Attorney with this information and take through the attorney legal action against him" (A 55).

For about a half hour Michael persisted in his denials. Finally he agreed to cooperate. He told the agents:

(a) that he obtained \$1.75 million in counterfeit Banker's Trust checks from Isaiah Crutch, a printer, whom he had met through two other individuals, Leonard Eisenberg and Steve Rowe; (b) that he and Mordecai sold the checks to

* All dates in this statement, unless otherwise specified, are 1975.

Natale Lipari and Matthew Ianello for \$120,000; (c) that he retained some of the checks and was attempting to sell them in Montreal; and (d) that Lipari and Ianello sold the rest of the checks to an unknown person (Mi. 23-25). Michael and Mordecai later learned that Korsen was the unknown person and that he had been arrested in Washington. Because of this, they received no payments from Ianello and Lipari (Mor. 39-40).

Mordecai

The agents' pizza parlor meeting with Michael exacted not only a confession but his assistance in obtaining evidence on the other conspirators and others as well. On September 16 Moody learned that underworld elements suspected both Mordecai and Michael of informing, and were going to kill them. Moody immediately arranged to see Mordecai to tell him of the threat and to urge his cooperation as well (H 23). Mordecai refused to admit his participation or to give any help.

The next day, September 17, two gangsters discovered Michael recording incriminating conversations with them (H 25). Moody again immediately spoke to Mordecai to tell him of this new danger and to renew his urgings for cooperation (A 58). Again Mordecai refused, but he agreed to spend the night in a New York hotel with Michael, at FBI expense, until they "found

out what were going to be repercussions of finding the recording device on Michael" (H 27).

Those "repercussions" became apparent on September 18 when Mordecai found out from a friend in Brooklyn that two gangsters were out looking for him, threatening to kill him (A 60). He spent that night as well with Michael in a hotel and met there the next morning with Moody. Moody told him he would "cooperate with us or you go on the streets" (A 64).

At that point Mordecai agreed to sign a waiver of rights form the agents had been pressing on him.* He gave information that day on other subjects (A 66-67). He and Michael were taken first to a United States Attorney in the Eastern District, who described federal protective custody, and then to Michael's father-in-law's home in Brooklyn (H 32), because they were afraid to return to their own (Mi. 150). Mordecai spent the weekend going over the relocation program with his family (H 47). On Monday, September 22, he was interviewed again by FBI Agent Parks and described his participation in the Banker's Trust offense (A 68).

Several days later Michael appeared in court in the Eastern District on his reduction of sentence application. The Government took the position that it did not know whether his cooperation would be helpful and whether he had told all he knew (H 198). His sentence was not reduced and he was given a surrender date (Mi. 166), notwithstanding his extensive cooperation to the point of risking his life.

* To overcome Mordecai's reluctance to sign the waiver form, Moody told him that Michael had also signed one (H 30). This was not so. Michael had never signed such a form (H 30).

Michael was shaken (Mi. 212). He and Mordecai had one further discussion with the United States Attorney on the Witness Protection Program but fled the jurisdiction instead. The Government caught up with them in March 1977.

Indictment, Hearing and Trial

The two count indictment on which defendants were tried was returned this past April (A 7). Prior to trial, defendants moved to suppress their confessions. The district court held a hearing at which Moody and several other agents testified, as well as Pattison, the U. S. Attorney who was at Michael's reduction of sentence hearing, Mordecai Silberberg, and Lefkowitz, the Brooklyn friend of Mordecai, who had told him of the threats to his life.

The district court denied the motions to suppress (A 10). It found that there had been adequate Miranda warnings (A 11) and that defendants' prior agreement to act as informers (actually Michael's) did not contemplate their own criminal activity (A 10). It did not address whether the agents had unlawfully secured Michael's confession by a promise not to turn over the matter to the United States Attorney, or had done the same with Mordecai, only this time using the fact that if he did not confess and cooperate, he would not receive Government protection and would be killed.

The Government tried Michael first. Moody testified to Michael's pizza parlor confession, to his prior involvement as an informer, and to his flight (Mi. 26-27). Another agent told how Michael had brought Crutch, the counterfeit printer, and Eisenberg and Rowe (pp.5-6 supra) to their attention weeks before, although without saying he was involved with them (Mi. 178-79). Yablonsky, the Washington agent, told about his meetings with and later arrest of Korsen (Mi. 193-99). That was the extent of the Government's case.* The only witness for Michael was his wife. He had wanted to testify himself but did not do so after the court denied his request to preclude the Government from cross-examination on crimes he may have committed after he fled the jurisdiction in the fall of 1975 (Mi. 3).

Michael's basic argument to the jury was that if he committed the acts alleged, it was in the role of FBI informant attempting to develop cases and win a reduction of his Eastern District sentence. The agents' answer was that their agreement with Michael did not include the commission of a crime (Mi. 173) and required moreover full disclosure at all times, which Michael had not done (Mi. 172). The jury convicted Michael on both counts. It did so after the district court denied Michael's motion to dismiss because the Government had not sufficiently proven his knowledge of the interstate transportation of the checks (A 76-78). The court charged the jury over Michael's

* And proving the counterfeiting.

objection that the interstate aspect would be satisfied if Michael, "knowing the securities to have been forged or counterfeit, gave them to another to dispose of without limitation as to where the sale was to have been made and the other person took it across state lines" (A 78, 24).

Mordecai's trial followed immediately after.

At its outset Mordecai moved to dismiss because the grand jury had been given the mistaken impression by Moody that Mordecai's confession was to him when in fact it was to another agent, Parks. The district court denied the motion (Mor. 4). Yablonsky testified first for the Government. He was followed by Parks, who told of Mordecai's confession (Mor. 35-40), and an FBI fingerprint expert, who identified Mordecai's fingerprint on one of the counterfeit checks received from Korsen in Washington (Mor. 69). Mordecai presented no witnesses. He argued that the Government, even with his confession, had shown Michael's criminal involvement but not his. The jury convicted Mordecai on both counts, the district court repeating the charge on interstate transportation which it had given at Michael's trial.

ARGUMENT

POINT I

MICHAEL'S CONFESSION WAS WRONGFULLY INDUCED BY THE AGENT'S PROMISE NOT TO PROSECUTE IF HE COOPERATED. THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS THAT CONFESSION.

The principle which governs Michael's confession is not in dispute. Any confession induced by a promise, however slight, must be suppressed. Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347-48 (1963); Malloy v. Hogan, 378 U.S. 1 (1964); Brady v. United States, 397 U.S. 742 (1970); United States v. Springer, 460 F.2d 1344 (7th Cir. 1972). It is the Government's burden to prove the promise was not made, and if the Fifth Circuit be followed, "with unmistakable clarity". United States v. Gonzalez, 548 F.2d 1185, 1189 (5th Cir. 1977). The Government clearly did not meet its burden in Michael's case.

The setting, this Court will recall, was that Michael had been in Canada with the counterfeit checks on August 27, as the FBI knew from the informer with whom Michael dealt and indeed from one of its agents who had seen Michael at the airport (H 17). Moody had contacted Michael for an urgent meeting near FBI headquarters,* had gotten a lie on where Michael had been over the weekend, and only at that point had given him the Miranda warnings.** What followed then: the

* A 53, Moody: "I contacted Michael Silberberg and told him I had to meet him that day. . . ."

** Michael did not execute a waiver of rights form either then or at any time. Moody blamed it on inadvertence (H 20).

intervention of Nelson, Moody's supervisor, to accuse Michael of the lie, and then to hold out that if Michael cooperated there would be no action taken. If he didn't, the FBI would go to the United States Attorney for prosecution.

The crucial testimony (it comes from Moody but the words to Michael are Nelson's) is as follows (A 55):

"A Then we also told him that we knew what he had been doing over the weekend, and Supervisor Nelson began talking to him at that time.

Q What did Mr. Nelson say?

A Told him that he had been lying to us, that we knew he was lying to us, that we knew what he had been doing, we knew that he had been dealing in checks in Canada, and that he had a choice at that time of whether to tell us what he had been doing and assisting us or that we would go to the United States Attorney with this information and take through the attorney legal action against him."

That such a promise was made, and that it brought about the confession (as unquestionably it did (A 56)) ought end the matter. See, as squarely in point, Grades v. Boles, 398 F.2d 409 (4th Cir. 1968) (suppression when prosecutor states that in all probability he will not press several other outstanding felony charges against defendant); United States ex rel Caserino v. Denno, 259 F.Supp. 784 (S.D.N.Y. 1966) (detective's statement to defendant that "no charges would be brought against him"). Several other facts, however, buttress Michael's argument.

(1) Michael's Canadian trip involved a violation of his Eastern District bail limits as well as counterfeit checks (Mi. 170-71). Since he was actively seeking to reduce his sentence and needed Government cooperation on that, the bail violation gave Nelson's remarks added leverage over him.

(2) For at least thirty minutes, Michael "either denied [Moody's allegations about Canada] or was not talking at all" (Mi. 171, A 10). This weighs heavily for the conclusion that his ultimate confession was not voluntary. Grades v. Boles, supra.

(3) The Government may argue from negative pregnant in the record (e.g. A 55), that the agents made no promise, or that they merely offered to bring Michael's cooperation to the attention of the sentencing judge. Moody's testimony belies any such argument. Equally important, at the September 29 Eastern District hearing to reduce Michael's sentence, the Assistant stated (emphasis supplied) (H 210): "I believe he will not be charged with other criminal acts known to our office now". This confirmed the existence of the promise.

(4) Moody deliberately withheld the Miranda warnings until he had secured an incriminating statement from Michael. His opening question was designed to and did elicit a lie,* testified to at the trial as such, and hammered to the

* Nelson was convinced before the meeting that Michael would not be truthful (H 108). He intended to use this to obtain Michael's help in apprehending others and to change Michael's role from confidential informer to testifying witness as the price for not prosecuting.

jury by the Assistant over two pages of summation as a false exculpatory statement (Mi. 237-38). The lie was also used to pressure Michael into a further confession. If, therefore, Miranda's custody requirement was satisfied,* Michael's rights thereunder were clearly violated. Custody aside, failure to give the warnings at the outset, as required, is further indication of the coerced nature of the confession.**

(5) A confession given in connection with a plea bargain must be suppressed when the plea bargain is not executed, even if the defendant is responsible for its failure. Mobley ex rel Ross v. Meek, 531 F.2d 924 (8th Cir. 1976). Michael, as part of his bargain, not only confessed but worked for weeks with the agents to apprehend other crime figures. He made telephone calls which the FBI monitored and recorded (H 21). He met with hoodlums with a tape recorder on his body, was discovered and was going to be killed because of it (H 23, 25). He took marked checks from Moody to pass to potential defendants (H 78). He discussed numerous matters with Moody (H 22-23) and was directed by him as to what actions to take (H 77).

The only thing he did not do was testify. Instead he fled. But that was because the Government, in spite of all he had done, including at the risk of his life, acted as if it had never heard of him in front of the Eastern District

* Oregon v. Mathiason, 429 U.S. 492 (1977) notwithstanding, we submit that it was: three agents around Michael, who is awaiting an Eastern District surrender date, in a pizza parlor near FBI headquarters, determined to exact a confession.

** The surest indication that we are right on the timing issue is that if Michael had confessed in response to the first question, and assuming the custody issue in our favor, the Government could not have used that confession because the warning had not yet been given.

court on sentence reduction, presenting him with jail and a threat to his life there. His brother and family, moreover, whom he had exposed to danger by his cooperation, were not prepared to undergo the rigors of the witness relocation program (Mi. 216-18). These circumstances may not suffice to compel the Government to forego prosecution, i.e., its part of the bargain. They require certainly that the confession not stand. Mobley ex rel Ross v. Meek, supra.*

* Throughout this period Michael was represented by an attorney in the Eastern District case. The matters discussed certainly bore on the sentence in that case. Yet the agents never contacted that attorney about their conferences with Michael (H 86). The principles, if not the direct holdings, of Brewer v. Williams, 97 S. Ct. 1232 (1977) and Massiah v. United States, 377 U.S. 201 (1964) apply.

POINT II

THE AGENTS WRONGFULLY INDUCED MORDECAI'S
CONFESSION THROUGH THE THREATS TO HIS LIFE.
THE DISTRICT COURT ERRED IN REFUSING TO
SUPPRESS IT.

The Government fares no better with Mordecai. The principle this time rests on the fact that the confession was induced by threats, in Mordecai's case violence from outsiders, although it could as well have been economic pressures if those had been substantial. Malloy v. Hogan, supra; United States ex rel Lunney v. Montanye, 500 F.2d 411 (2d Cir. 1974) (state's availing of employee's discharge coercion if economic consequences are substantial); Garrity v. New Jersey, 385 U.S. 493 (1967) (removal from office); Spevack v. Klein, 385 U.S. 511 (1967) (disbarment); Lefkowitz v. Turley, 414 U.S. 70 (1973) (disqualification from public bidding); United States ex rel Kiernan v. LaVallee, 191 F.Supp. 455 (S.D.N.Y. 1961) (beatings to co-defendant). Compare United States v. DuVall, 537 F.2d 15 (2d Cir. 1976) (coercive effect of U.S. Attorney's statement to defendant that unless he cooperated he might be sentenced to 100 years). The case is even worse because Michael's attempt to obtain evidence for the FBI engendered the threat in the first place,* and that attempt (as well as Michael's implication of Mordecai) was itself the result of

* And Mordecai's help as well since once earlier, when Michael had information but could not pass it on to Moody, Mordecai did it for him (H 13).

the agents' illegal conduct set forth in Point I. See

People v. Johnson, 450 P.2d 865 (Cal. Sup. Ct. 1969

("where a defendant's confession is secured by exploiting the use of a codefendant's confession which was the product of an unlawful search and seizure, the defendant's confession . . . may also be fruit of the poisonous tree"); United States v. Tane, 329 F.2d 848 (2d Cir. 1964); Wong Sun v. United States, 371 U.S. 471 (1963); United States ex rel Stephen J.B. v. Shelly, 430 F.2d 215, 219 (2d Cir. 1970) (second voluntary statement inadmissible if result of illegally coerced first statement).

The record demonstrates that the agents carefully orchestrated the threat to Mordecai's life to overcome his silence and compel his cooperation as well.

(1) Moody learned of the threat to Mordecai on September 16.* Immediately, he had Michael, (whom the FBI was then "protecting" (A 69), bring Mordecai to meet him near FBI headquarters, to warn of the "danger", and "to obtain Mordecai's assistance if he would give it" (A 69). There was testimony that the FBI always warns people when it has word they will be killed (A 70). A warning is one thing. A warning, coupled with an offer of protection only if there is cooperation, and to one who has no other means of protection, is another. And to drive the point home Moody could point to Michael, who was

* The information in full was that Mordecai would be kidnapped and held for \$20,000 ransom from Michael. When the ransom was paid, both would be killed as informers (A 69).

then cooperating and because of it was in fact receiving FBI protection.

(2) Mordecai told the FBI "that he did not want to cooperate with us, that he did not believe anybody would kill him like that, and . . . that he could talk them out of it. And he left." (A 71) That night Michael promised Mordecai he would do nothing further to endanger them (H 224). The next day, however, Michael was caught with the recording device, giving Moody a second opening. Immediately, he had Michael call Mordecai to FBI headquarters, "[I]t was very important" (A 71a), so he could "talk to Mordecai again about assisting the Government through testimony" in light of the discovery of Michael's cooperation (A 71a, 72). Mordecai was furious at Michael and the FBI for getting him into that position, and again refused to say anything.

(3) Moody did not give up so easily. He was putting Michael up at a hotel and talked Mordecai into staying there also. The point was not lost on Mordecai that Michael had escaped from earlier meetings with the hoodlums only because the FBI was surveilling it and protected him (A 71a). Indeed, Mordecai was also now receiving a kind of de facto protection, so that when he went the next day to his friend's in Brooklyn and found out that the gangsters were looking for him, two agents accompanied him (A 72).

(4) Moody housed Mordecai and Michael again that night and had agents at the hotel first thing the next morning. Indeed at that point the FBI had so much leverage over Mordecai that the agents insisted that cooperation would not be enough. If Mordecai wanted protection he would have to sign the waiver of rights form as well (A 64). Moody put it straight to Mordecai, who up to that moment had been wavering back and forth, always considering alternatives with Michael (A 63): "You cooperate or you go on the streets" (A 64). Faced with that choice, Mordecai "indicated he would sign the form and I [Moody] went back to our office" (H 31). Mordecai then gave information to the agents, including the September 22 confession used at his trial.

For days, then, Mordecai had resisted cooperation. Grades v. Boles, supra. But his physical safety was at stake. The price of that safety was cooperation. With it, the FBI would continue to protect him. Without it, he would be on his own and would be killed. The case for a coerced confession could not be stronger.*

* Mordecai's confession is invalid on the further ground that Moody misrepresented that Michael had also signed a waiver form. United States ex rel Everett v. Murphy, 329 F.2d 68 (2d Cir. 1964).

POINT III

THE GOVERNMENT FAILED TO PROVE THAT DEFENDANTS' CONSPIRACY EXTENDED TO MOVEMENT OF THE COUNTERFEIT CHECKS IN INTERSTATE COMMERCE. IN ADDITION THE DISTRICT COURT ERRONEOUSLY CHARGED ON THE INTERSTATE TRANSPORTATION ELEMENT OF COUNT TWO.

According to the Government's evidence, Michael and Mordecai had dealt only with Lipari and Ianello. They never knew about Korsen or his trip to Washington. That is the end of the conspiracy count because their agreement did not extend to an interstate transportation about which they did not know. United States v. Jacobs, 475 F.2d 270, 281-82 (2d Cir. 1973).

With respect to the substantive count, the district court charged in exactly the language disapproved by this Court in United States v. Scandifici, 390 F.2d 244, 248-49 (2d Cir. 1968). In fact the Government failed to prove its case under that charge, there being no evidence one way or the other that there were or were not limitations placed by the Silberbergs on where Lipari and Ianello could take the checks. The second count, as well, then, should have been dismissed, or at the very least, a new trial granted because of the erroneous charge.

Finally, at Michael's trial, the district court should not have precluded his testimony by opening the door to the Government's cross examination of events after he ceased being an informant, and should have sustained his argument as a matter of law, that his activities with respect to the counterfeit checks were protected by his role as an informant

developing cases for the Government. The district court furthermore should have dismissed the indictment with respect to Mordecai because of the Government's failure before a grand jury to make clear that Moody's testimony of Mordecai's confession was hearsay. United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

CONCLUSION

Often this Court compliments law enforcement authorities on the diligence and imanginativeness of their work. The agents here were both diligent and imaginative and their work resulted in two convictions. But at what cost to the belief that a defendant should not be coerced to convict himself out of his own mouth? For certainly without that coercion -- a promise in one, and a threat in the other -- there would have been no case for the Government.

This Court should hold that the motions to suppress should have been granted, and direct dismissal of the indictment as to both defendants. Barring that, it should direct dismissal of the conspiracy count because no interstate transportation aspect of an agreement was proven. It should

also direct dismissal, or at least a new trial, on Count Two. If, however, the conviction on Count Two is allowed to stand, there should be a remand for resentencing since the prison terms imposed were with respect to Count One.

Respectfully submitted,

ALBERT J. BRACKLEY, ESQ.
Attorney for Appellant
Michael Silberberg
185 Jerolemon Street
Brooklyn, New York 11201

HOWARD L. JACOBS, ESQ.
DONALD E. NAWI, ESQ.

Of Counsel

HOWARD L. JACOBS, P.C.
Attorney for Appellant
Mordecai Silberberg
401 Broadway
New York, New York 10013

U.S. v. Silberberg

77-1322

CERTIFICATE OF SERVICE

I certify that on November 3, 1977 I
had ~~delivered~~ one copy of the Brief and
Appendix for Appellants to Robert Fiske,
Esq., One St. Andrews Plaza, New York,
N.Y. 10007.

Donald S. Trow